Alliance Finance Bhd (previously known as Bolton Finance Bhd) v Cahaya Kelang Construction Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL NO D4–22–99 1 OF 2002
ABDUL WAHAB PATAIL J
2 FEBRUARY 2005

Civil Procedure — Summary judgment — Triable issues — Discrepancies as to amount outstanding — Claim of discrepancies founded upon statements of account that were relating to different dates — Failure of plaintiff to respond to claim of discrepancies — Whether amounted to admission that amount claimed was incorrect

The plaintiff/respondent had extended hiring facilities to the defendants/appellants of a number of equipment. The plaintiff and the first defendant then entered into various hire purchase agreements. The first defendant had breached the first to 32nd agreements by defaulting in payment of monthly instalments. As a result the plaintiff terminated the hire purchase transactions and demanded payment for arrears. When the defendants did not fully comply with the plaintiff's notice, the plaintiff commenced legal action to claim the outstanding sum of RM4,290,99.42 calculated as at 26 February 2001, plus interest at the rate of 18.27% per annum, general damages and other reliefs. The deputy registrar allowed the plaintiff's application to enter summary judgment for the sum of RM4,290,699.62 as at 26 February 2001; thus the defendant appealed. The defendants contended there were discrepancies as to the amount outstanding. The amount outstanding for each individual agreement in exhibit 'AFB-39' (the statement of account dated 26 February 2001) did not tally with the amount outstanding for that agreement in exhibit 'AFB-31' (ie the amount outstanding for each agreement stated in the plaintiff's letter dated 30 May 1998). Further, the total amount outstanding for all the agreements in both these exhibits differs.

Held, dismissing the appeal with costs:

(1) Since the letter confirming variation of the agreements stated the status as on 30 May 1998 while the statement of account set out the status on 26 February 2001, it was obvious there would be a difference in the amount outstanding. There was, therefore, no contradiction. The correctness of the statement of account as on 26 February 2001 was, as a result, not so challenged such as to require a response from the plaintiff. Accordingly, failure of the plaintiff to respond to this specific challenge did not attract the application of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (refd) for a finding that the plaintiff had admitted that the amount claimed was incorrect (see para 10).

(2) The plaintiff had made a claim on the basis of the statement of account and produced the statement of account to prove its claim. The statement of

account was consistent with the claim. The defendant did not deny any default. The defendant's challenge was on the amount payable. They claimed there were discrepancies. That claim could not succeed because the claim of discrepancies was founded upon statements of account that were clearly relating to different dates. There was, therefore, no substance to the claim that there were discrepancies (see para 12).

(3) The defendants had not shown any manifest error on the statements of account. The only claimed 'error' was the fact of differences in the sum outstanding. But that was easily explained by the fact the two statements were issued as correct on different dates. That alone, without more, did not show any prima facie error, let alone manifest error. There were, therefore, no issues of fact as would require a trial for determination (see para 15).

[Bahasa Malaysia summary

Plaintif/responden telah memberikan kemudahan sewaan kepada defendan-defendan/perayu-perayu berhubung dengan beberapa peralatan. Plaintif dan defendan pertama kemudiannya telah memasuki beberapa perjanjian sewa beli. Defendan pertama telah mengingkari perjanjian pertama dan perjanjian yang ke 32 kerana telah gagal membuat bayaran ansuran bulanan. Oleh yang demikian plaintif telah menamatkan transaksi-transaksi sewa beli tersebut dan menuntut bayaran tertunggak. Apabila defendan-defendan tidak mematuhi sepenuhnya notis plaintif, plaintif memulakan tindakan undang-undang untuk menuntut jumlah tertunggak sebanyak RM4,290,99.42 yang dikira setakat 26 Februari 2001, termasuk faedah pada kadar 18.27% setahun, ganti-rugi umum dan relief-relief lain. Timbalan pendaftar membenarkan permohonan plaintif untuk memasukkan penghakiman terus untuk jumlah sebanyak RM4,290,699.62 setakat 26 Februari 2001; maka defendan pun merayu. Defendan-defendan mendakwa bahawa terdapat percanggahan-percanggahan dalam jumlah yang tertunggak itu. Jumlah tertunggak untuk setiap satu perjanjian tersebut dalam ekshibit 'AFB-39' (pernyataan akaun bertarikh 26 Februari 2001) tidak sama dengan jumlah tertunggak dalam perjanjian dalam ekshibit 'AFB-31' (iaitu jumlah tertunggak untuk setiap perjanjian tersebut yang dinyatakan di dalam surat plaintif bertarikh 30 Mei 1998). Selanjutnya, jumlah keseluruhan jumlah tertunggak untuk kesemua perjanjian tersebut di dalam kedua-dua ekshibit itu adalah berbeza.

Diputuskan, menolak rayuan dengan kos:

(1) Memandangkan surat yang mengesahkan perubahan perjanjian-perjanjian tersebut menyatakan status setakat 30 Mei 1998 manakala pernyataan akaun menyatakan status setakat 26 Februari 2001, ianya jelas bahawa akan wujud perbezaan dalam jumlah tertunggak. Oleh yang demikian tiada terdapat bercanggahan. Ketepatan pernyataan akaun setakat 26 Februari 2001 dari itu tidak tersangkal sampai memerlukan jawapan dari plaintif. Dari itu, kegagalan plaintif untuk menjawab bantahan ini tidak membangkitkan penggunaan

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd) untuk keputusan yang plaintif telah mengakui jumlah yang dituntut tidak betul (lihat perenggan 10).

(2) Plaintif telah membuat satu tuntutan berdasarkan pernyataan tuntutan dan telah mengemukakan pernyataan tuntutan tersebut sebagai bukti kepada tuntutannya. Pernyataan akaun tersebut adalah selaras dengan tuntutan tersebut. Defendan tidak menafikan sebarang pengingkaran. Bantahan defendan adalah berkenaan jumlah yang kena bayar. Mereka mendakwa terdapat bercanggahan. Dakwaan ini tidak boleh diterima kerana dakwaan percanggahan itu adalah didasarkan pada pernyataan-pernyataan akaun yang secara jelasnya berhubung dengan tarikh-tarikh yang berbeza. Oleh yang demikian, dakwaan mengenai percanggahan ini adalah tidak berasas (lihat perenggan 12).

(3) Defendan-defendan tidak menunjukkan sebarang kesilapan yang nyata pada pernyataan-pernyataan akaun tersebut. Dakwaan 'kesilapan' hanyalah pada fakta yang bahawa terdapat perbezaan pada jumlah tertunggak. Tetapi ini dengan senangnya dapat dijelaskan dengan fakta yang kedua-dua pernyataan tersebut dikeluarkan dengan betul pada tarikh-tarikh yang berbeza. Ini sahaja, tanpa apa-apa lagi, tidak menunjukkan sebarang kesilapan prima facie, inikan pula kesilapan yang nyata. Oleh yang demikian, tiada isu fakta yang perlu diputuskan dengan perbicaraan. (lihat perenggan 15).]

Notes

For cases on triable issues, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6540–6613.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Chong Hin Trading Co Sdn Bhd & Ors v Malayan Banking Bhd [2004] 4 MLJ 453 (refd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Legislation referred to

Evidence Act 1950 s 101
Rules of the High Court 1980 O 14

Siti Haida Ishak (TG Lim & Partners) for the plaintiff/appellant.
Cheryl Nicholson (R Kengadharan & Co) defendants/respondents.

Abdul Wahab Patail J:

[1] This is the defendants' appeal against the decision of the deputy registrar allowing the plaintiff to enter final judgment against the defendants under O 14 of the Rules of the High Court 1980.

[2] The plaintiff/respondent (formerly known as 'Bolton Finance Berhad') had, via three letters of offer dated 26 April 1996, 25 June 1996 and 15 October 1996, extended hiring facilities to the defendants/appellants of a number of equipment. The plaintiff and the first defendant then entered into various hire purchase agreements. The plaintiff and the first defendant had subsequently agreed to vary the hire purchase agreements initially through the plaintiffs letter dated 26 May 1998 ('variation letter') followed by variation agreements for each of the hire purchase agreements. The hire purchase agreements and variation agreements are collectively referred to as 'the first to 32nd agreements'. In consideration of the plaintiff extending hire purchase credit to the first defendant and acceding to the first defendant's request for extension of time to repay the moneys due to the plaintiff under each agreement, the second and third defendants had executed an indemnity and guarantee dated 23 September 1996, 27 January 1997 and 32 memorandum of guarantees all dated 30 May1998 in favour of the plaintiff. The 32 memorandum of guarantees were enclosed with the first to 32nd agreements.

[3] It was provided in the indemnity and guarantee, amongst other things, that:

(i) the second and third defendants shall be jointly and severally liable to the plaintiff;

(ii) the second and third defendants would be regarded as the principal debtors to the plaintiff;

(iii) the second and third defendants would repay the plaintiff on demand all moneys due by the defendant to the plaintiff;

(iv) the second and third defendants would not be discharged of any and all of their obligations to the plaintiff despite any variation and/or renewal of the agreements with the first defendant;

(v) any statement of account showing the indebtedness or loss of damage of the plaintiff duly signed by an officer of the plaintiff shall be conclusive binding of the debt due by the second and third defendants to the plaintiff;

(vi) the second and third defendants shall not set off or raise a counterclaim against the first defendant to the plaintiff until the second and third defendants have fully complied with their obligations under the instruments;

(vii) to pay the plaintiffs costs of enforcement of the agreement and this instrument on a solicitor and client basis.

[4] It was conceded in their submission that the first defendant has breached the first to 32nd agreements by defaulting in payment of monthly instalments. As a result, the plaintiff's solicitors had issued notices of demand to the defendants dated 13 February 2001 and 9 March 2001 which demanded payment for arrears, terminated the hire purchase transactions, demanded the total sum due and the return of the hired machineries. The defendants have failed, refused and/or neglected to fully comply the plaintiff's notice.

[5] Since there was no response, the plaintiff commenced legal action to claim the outstanding sum of RM4,290,99.42 calculated as at 26 February 2001, plus interest

at the rate of 18.27% pa, general damages and other reliefs. Particulars of the outstanding sum for each of the first to 32nd agreements and the statement of account were provided.

[6] The deputy registrar has allowed the plaintiff's application to enter summary judgment for the sum of RM4,290,699.62 as at 26 February 2001 together with interest at the rate of 8% pa from the date on the Writ on the sum of RM4,140,935.69 until full settlement.

[7] The defendants/appellants contended there are discrepancies as to the amount outstanding.

[8] Exhibit 'AFB-3' is the letter confirming the variation of the agreements. In the said letter, the plaintiff/respondent has stated the amount outstanding as at the 30 May 1998 for each of the agreements, giving a total sum of RM4,896,774.36. On the other hand, exh 'AFB-39', the statement of account of the sums outstanding as at the 26 February 2001 gave the breakdown of the amount financed, term charges, progressive interest charged and paid, instalment paid, prepaid instalment, rebate as at 30 May 1998, late charges as at 30 May 1998, postage, interest charges from 1 June 1998 to 31 May 1999 etc. The total amount outstanding under all the agreements as at the 30 May 1998 is stated in p 5 of the statement and it is RM3,940,300.87.

[9] It is to be noted that the amount outstanding for each individual agreement in exh 'AFB-39' did not tally with the amount outstanding for that agreement in exh 'AFB-31'. Further, the total amount outstanding for all the agreements in both these exhibits differ.

[10] Since the letter confirming variation of the agreements stated the status as on 30 May 1998 while the statement of account set out the status on 26 February 2001, it is obvious there would be a difference in the amount outstanding. There is, therefore, no contradiction. The correctness of the statement of account as on 26 February 2001 is, as a result, not so challenged such as to require a response from the plaintiff. Accordingly, failure of the plaintiff to respond to this specific challenge does not attract the application of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA) for a finding that the plaintiff has admitted that the amount claimed is incorrect.

[11] Relying upon s 101 of the Evidence Act 1950 which provides:

(i) Whosoever desires any court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove those facts exist.

(ii) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.,

The defendants submitted:

> In all honesty, the defendants/appellants are not denying taking the facility nor denying owing the plaintiff/respondent some amount (exhibit 'AFB-A' enclosures 9 and 10) but what

A they are denying is the amount claimed by the plaintiff/respondent as the amount owing by the defendants/appellants in the light of discrepancies in the plaintiff/respondent's statements of account. The plaintiff/respondent has failed to explain this discrepancy and hence has failed to prove the correct amount owing by the defendants/appellants.

B **[12]** The plaintiff had made a claim on the basis of the statement of account and produced the statement of account to prove its claim. The statement of account is consistent with the claim. The defendants' did not deny any default. The defendants' challenge was on the amount payable. They claim there are discrepancies. That claim cannot succeed because the claim of discrepancies is founded upon statements of account that were clearly relating to different dates. There is, therefore, no substance C to the claim that there were discrepancies.

[13] In *Chong Hin Trading Co Sdn Bhd & Ors v Malayan Banking Bhd* [2004] 4 MLJ 453, the Court of Appeal held that (at p 462):

D The respondent had satisfied all the considerations and had established a prima facie case against the appellants as far as the said sum and interest were concerned. The appellants had failed to satisfy the court on affidavit evidence that there was an issue or question in dispute which ought to be tried as far as that said sum and that interest were concerned, and that being the case, there was no reason why this part of the application for summary judgment should be refused'.

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[14] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, the then Supreme Court held that (at p 408):

Under O 14 application, the duty of a judge does not end as soon as a fact is asserted by F one party and denied or disputed by the other in an Affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless the principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.

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[15] The defendants have not shown any manifest error on the statements of account. The only claimed 'error' is the fact of differences in the sum outstanding. But that is easily explained by the fact the two statements were issued as correct on different dates. That alone, without more, does not show any prima facie error, H let alone manifest error. There are, therefore, no issues of fact as would require a trial for determination.

[16] It has been clearly explained in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 that (at p 184):

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The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

[17] There being no other grounds relied upon, this is such a clear case as referred to in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd*. defendants' appeal must, therefore, fail.

[18] The appeal was dismissed with costs.

Appeal dismissed with costs.

Reported by Loo Lai Mee